

<b>DRAFT WQC 2012-404P-002</b>		<b>FOR PUBLIC REVIEW</b>
May 1, 2012	Public Comment Period Begins 05/01/2012 Public Comment Period Ends 05/30/2012 at 4 pm	
Page 1 of 6	<b><u>INSTRUCTIONS FOR SUBMITTING COMMENTS:</u></b> Only written comments will be accepted. Comments may be sent by postal mail, email or fax. Please include the project name/number, your name, organization, mailing address, email address and telephone number with your submittal. By Mail: 401 Certification Program NHDES Watershed Management Bureau P.O. Box 95 Concord, NH 03301-0095 Attention: Owen David By FAX: 401 Certification Program (Attention: Owen David) (603) 271-7894 By email: owen.david@des.nh.gov Questions? Please call (603) 271-0699	

Erika L. Mark  
 Regulatory Division  
 U.S. Army Corps of Engineers  
 696 Virginia Road  
 Concord, MA 01742-2751

## WATER QUALITY CERTIFICATION

In Fulfillment of

Section 401 of the United States Clean Water Act (33 U.S.C 1341)

WQC # 2012-404P-002

Activity Name	New Hampshire State Programmatic General Permit
Activity Location	State of New Hampshire
Owner/Applicant	Regulatory Division U.S. Army Corps of Engineers 696 Virginia Road Concord, MA 01742-2751
DATE OF APPROVAL (subject to Conditions below)	-----, 2012

### A. INTRODUCTION

The U.S. Army Corps of Engineers New England District (Applicant) seeks a Clean Water Act (CWA) Section 401 Water Quality Certification (Certification) from the New Hampshire Department of Environmental Services (DES) for the New Hampshire

Programmatic General Permit (PGP). The PGP is a statewide permit, which will be issued by the Applicant pursuant to 33 CFR 325.5(c)(3), for minimal-impact activities within the State of New Hampshire. The intent of the PGP is to simplify the permit application review processes of the Applicant and DES Wetlands Bureau, as the permit review processes are nearly parallel relative to federal and state statutory authority. The current PGP expires June 28, 2012. The new PGP is expected to become effective in June 2012 and will be in effect until June, 2017.

This 401 Certification documents laws, regulations, determinations and conditions related to the PGP for the attainment and maintenance of NH surface water quality standards, including the provisions of NH RSA 485-A:8 and NH Code of Administrative Rules Env-Wq 1700, for the support of designated uses identified in the standards.

#### B. WATER QUALITY CERTIFICATION APPROVAL

Based on the findings and conditions noted below, the New Hampshire Department of Environmental Services (DES) has determined that any discharge associated with the Activity will not violate surface water quality standards, or cause additional degradation in surface waters not presently meeting water quality standards. DES hereby issues this 401 Certification subject to the conditions defined in Section E of this 401 Certification, in accordance with Section 401 of the United States Clean Water Act (33 U.S.C. 1341).

#### C. STATEMENT OF FACTS AND LAW

- C-1. Section 401 of the United States Clean Water Act (CWA, 33 U.S.C. 1341) states, in part: "Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.....No license or permit shall be granted until the certification required by this section has been obtained or has been waived...No license or permit shall be granted if certification has been denied by the State..."
- C-2. Section 401 further states, in part "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations...and shall become a condition on any Federal license or permit subject to the provisions of this section."
- C-3. RSA 485-A:12, III states " No activity, including construction and operation of facilities, that requires certification under section 401 of the Clean Water Act and that may result in a discharge, as that term is applied under section 401 of the Clean Water Act, to surface waters of the state may commence unless the department certifies that any such discharge complies with the state surface

water quality standards applicable to the classification for the receiving surface water body. The department shall provide its response to a request for certification to the federal agency or authority responsible for issuing the license, permit, or registration that requires the certification under section 401 of the Clean Water Act. Certification shall include any conditions on, modifications to, or monitoring of the proposed activity necessary to provide assurance that the proposed discharge complies with applicable surface water quality standards. The department may enforce compliance with any such conditions, modifications, or monitoring requirements as provided in RSA 485-A:22."

- C-4. RSA 485-A:8 and Env-Wq 1700 (Surface Water Quality Regulations, effective December 3, 1999) together fulfill the requirements of Section 303 of the Clean Water Act that the State of New Hampshire adopt water quality standards consistent with the provisions of CWA. Further, RSA 485-A:8 establishes two classes or grades of surface waters in New Hampshire for the purposes of classification: Class A and Class B.
- C-5. Env-Wq 1700 provides narrative water quality standards and numeric water quality criteria. Among other purposes, Env-Wq 1700 is used by DES for evaluating applications for 401 Water Quality Certification.
- C-6. Env-Wq 1701.02, entitled "Applicability", states that:
  - a. These rules shall apply to all surface waters.
  - b. These rules shall apply to any person who causes point or nonpoint source discharge(s) of pollutants to surface waters, or who undertakes hydrologic modifications, such as dam construction or water withdrawals, or who undertakes any other activity that affects the beneficial uses or the level of water quality of surface waters."
- C-7. Env-Wq 1702.18 defines a discharge as:
  - a. The addition, introduction, leaking, spilling, or emitting of a pollutant to surface waters, either directly or indirectly through the groundwater, whether done intentionally, unintentionally, negligently, or otherwise; or
  - b. The placing of a pollutant in a location where the pollutant is likely to enter surface waters.
- C-8. Env-Wq 1702.39 defines a pollutant as: "pollutant" as defined in 40 CFR 122.2. This means "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water."

- C-9. Env-Wq 1702.46 defines surface waters as "perennial and seasonal streams, lakes, ponds and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses and other bodies of water, natural or artificial," and waters of the United States as defined in 40 CFR 122.2."
- C-10. Surface waters are navigable waters for the purposes of certification under Section 401 of the Clean Water Act. Surface waters are jurisdictional wetlands for the purposes of wetlands permitting under RSA 482-A.
- C-11. The named and unnamed surface waters, including rivers and streams, lakes and ponds, and wetlands, in New Hampshire, potentially affected by activities permitted under the PGP, are surface waters under Env-Wq 1702.46.
- C-12. Env-Wq 1703.01 (c) states that "All surface waters shall provide, wherever attainable, for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the surface waters."
- C-13. Env-Wq 1703.19, entitled "Biological and Aquatic Community Integrity", states that
- a. The surface waters shall support and maintain a balanced, integrated and adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of similar natural habitats of a region; and
  - b. Differences from naturally occurring conditions shall be limited to non-detrimental differences in community structure and function."
- C-14. Env-Wq 1703.21 (a)(1) states that "Unless naturally occurring or allowed under part Env-Wq 1707, all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that injure or are inimical to plants, animals, humans or aquatic life."
- C-15. The PGP is a federal wetlands permit under the federal Clean Water Act Section 404.
- C-16. The Applicant provided public notice for the PGP on February 28, 2012. The public notice included a draft PGP and a request for public comments. DES Watershed Management Bureau provided written comments by electronic mail in April, 2012.
- C-17. The Applicant is responsible for the development and implementation of the PGP, including any amendments.

#### D. FINDINGS

- D-1. The PGP reviewed for this 401 Certification is the draft PGP developed by the Applicant, as described in the public notice dated February 28, 2012 and in subsequent correspondence with the Applicant.

- D-2. The PGP is a federal permit, which requires water quality certification under Section 401 of the federal Clean Water Act.
- D-3. Activities permitted under the PGP may result in a discharge and may cause permanent or temporary impacts to surface waters in New Hampshire.
- D-4. The Applicant consulted private and public entities, including the DES Wetlands Bureau during the development of the PGP.
- D-5. The PGP will be issued for projects that include dredge and fill of wetlands. DES Wetlands Bureau permitting process addresses dredge and fill impacts to jurisdictional wetlands. The 401 Certification decision relies, in part, on an approved permit from the DES Wetlands Bureau for the potential construction and post construction-related impacts to jurisdictional wetlands and other affected surface waters.
- D-6. Projects that include dredge and fill of wetlands under the PGP may also include temporary or permanent impacts to surface hydrologic conditions, such as peak runoff. DES Alteration of Terrain permitting process addresses impacts to surface hydrological conditions. The 401 Certification decision relies, in part, on an approved permit from the DES Alteration of Terrain Program for the potential construction and operation-related impacts to surface hydrology.
- D-7. DES periodically reviews wetlands permit applications for projects included under the PGP to determine whether additional conditions or an individual 401 Certification application is necessary.
- D-8. Most projects included under the PGP, if conducted in accordance with the conditions of the PGP, DES Wetlands Permit, and DES Alteration of Terrain Permit are not expected to cause or contribute to violations of water quality standards.

#### E. WATER QUALITY CERTIFICATION CONDITIONS

- E-1. Construction or operation of all projects included under the PGP shall meet NH surface water quality standards.
- E-2. Applications for projects included under the PGP shall be subject to DES review to determine whether additional conditions or an individual 401 Certification application is necessary to ensure compliance with surface water quality standards.
- E-3. If DES determines that surface water quality standards are being violated by the specific project or there is reasonable potential to expect that water quality standards will be violated if more project specific conditions are not included in the 401 Certification, DES may modify this 401 Certification for the specific project to include additional conditions to ensure compliance with surface water quality standards.

- E-4. Construction on any specific project permitted under the PGP shall not commence until all other applicable permits and approvals have been granted, including those permits issued through DES Wetlands Bureau and, if necessary, DES Alteration of Terrain Program.
- E-5. All applicable conditions in the NH PGP shall be followed.
- E-6. DES reserves the right to inspect any project permitted under the PGP and the effects of the project on affected surface waters at any time to monitor compliance with the NH surface water quality standards.

#### F. APPEAL

If you are aggrieved by this decision, you may appeal the decision to the Water Council. Any appeal must be filed within 30 days of the date of this decision, and must conform to the requirements of Env-WC 200. Inquiries regarding appeal procedures should be directed to NHDES Council Appeals Clerk, 29 Hazen Drive, PO Box 95, Concord, NH 03302-0095; telephone 603-271-6072.

If you have questions regarding this 401 Certification, please contact Owen David at (603) 271-0699.

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Harry T. Stewart, P.E.  
Director, Water Division

cc:

Ted Diers, DES Watershed Management Bureau  
Collis Adams, DES Wetlands Bureau  
Owen David, DES Watershed Management Bureau  
Chris Williams, DES Watershed Management Bureau (Coastal Consistency Program)  
Carol Henderson, NH Fish and Game Department  
Ralph Abele, U.S. Environmental Protection Agency  
John Warner, U.S. Fish and Wildlife Service